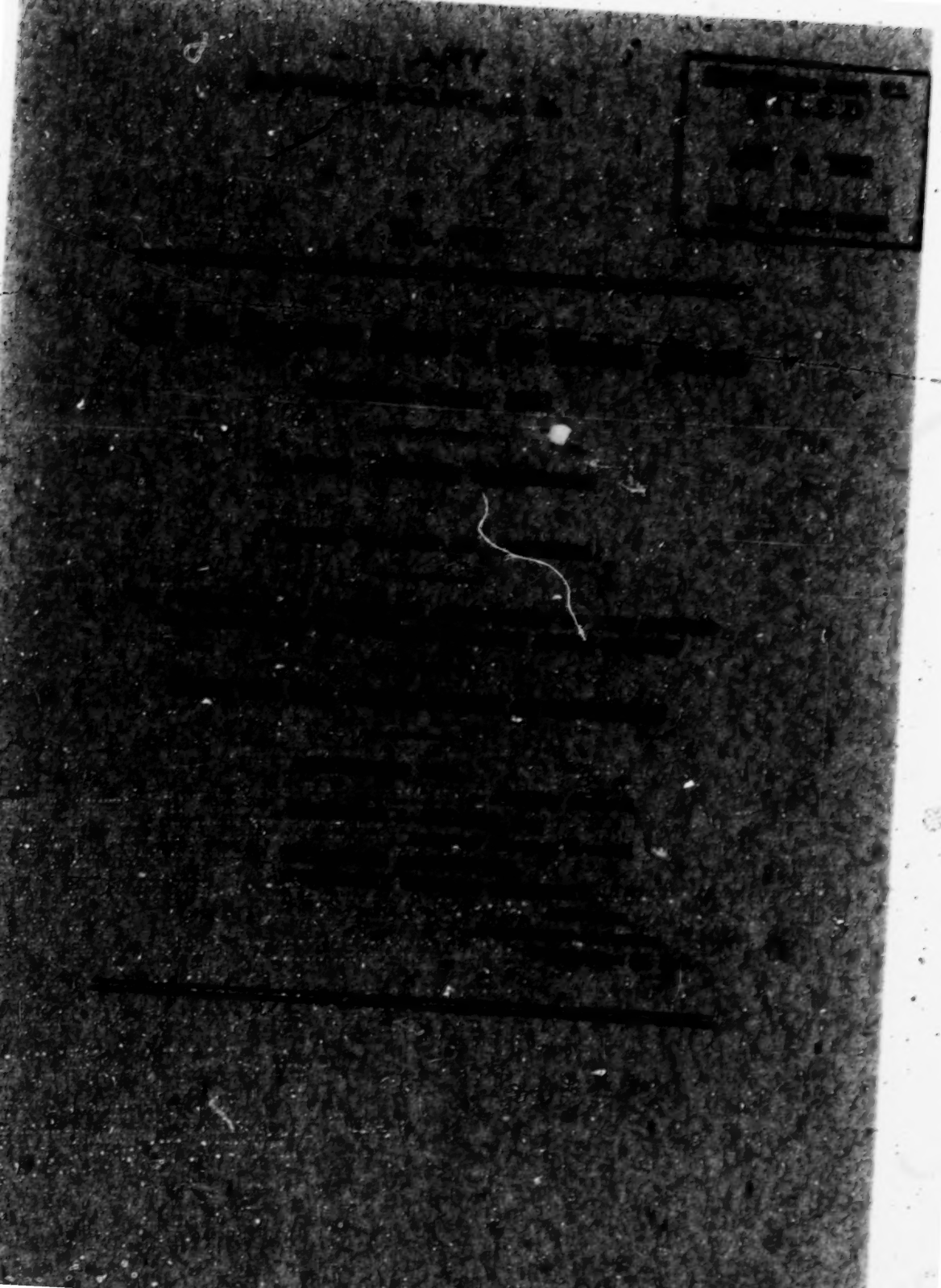


In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 772

SAMSON EISNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 194–197) is reported at 297 F. 2d 595.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1962 (R. 193). On February 9, 1962, Mr. Justice Stewart entered an order extending the time for filing a petition for a writ of certiorari to and including March 6, 1962 (Pet. App. 1a). The petition was filed on March 5, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

1. Whether the search warrant was issued on probable cause.

2. Whether the seizure of stolen furs under a search warrant was valid where it subsequently developed that the furs were stolen from a source other than that described in the warrant.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Western District of Kentucky on a one-count indictment which charged the receipt and concealment of furs stolen in South Dakota and transported interstate in violation of 18 U.S.C. 2315 (R. 12–13, 185). He was sentenced to imprisonment for five years and fined $1,500 (R. 25–26, 186). The court of appeals unanimously affirmed the conviction (R. 194–197).

The issues raised relate to the validity of the seizure of the stolen furs, valued at $7,700 (R. 55). On this issue the facts may be summarized as follows:

Through official F.B.I. channels, an F.B.I. agent in Bowling Green, Kentucky, was informed that furs had been stolen from the Davidson Indiana Fur Company in Indianapolis on September 4, 1960, and that an agent of the Cincinnati office had information, which he believed to be reliable, that petitioner had received part of the furs after they had been transported from Indianapolis (R. 16, 117–118). On September 7, 1960, F.B.I. agents in Covington, Kentucky, set up a surveillance of petitioner, who was driving a 1960 white convertible Oldsmobile with a blue top (R. 62–63). Petitioner was followed part of the way to Bowling Green and then lost (R. 69–71). At

2:30 an F.B.I. agent in Bowling Green informed the city detective that petitioner's car was headed that way at an excessive rate of speed and was probably carrying "stolen merchandise," and that if the detective should have occasion to arrest the driver, the agent would like to know what could be observed in the car (R. 77–78, 115–116). The agent did not inform the detective that the stolen items were furs (R. 113–114). The agent and detective discovered petitioner as he was coming into town, and when he failed to stop for a stop sign, the city detective arrested him (R. 106–107, 78–79).[1]

Thereafter the city detective asked petitioner if he could look in the back of the car, telling him that they were "having trouble with people out of state hauling whiskey into Bowling Green" (R. 79), which was then dry (R. 85). Petitioner opened the trunk and assisted the city detective in looking through the paper sacks and a duffel bag (R. 79–80, 127). A light gray fur was sticking out of one of the sacks. Petitioned volunteered, "They are my wife's furs" (R. 80). The agent, who remained in the F.B.I. car, also saw the sacks and duffel bag and a piece of fur protruding from one (R. 107–108).

Petitioner was brought to the city hall at 3:10 (R. 108) and the judge was called (R. 87). At 4:05 the F.B.I. agent told petitioner that he was under arrest for the federal offense of receipt and concealment of stolen furs and advised him of his rights

[1] On cross-examination the city detective testified (R. 96): "If he hadn't run a stop sign, we would never have stopped him."

(R. 108–109).[2] The agent asked for permission to search the trunk. Petitioner threw the keys to the city detective and said, "Well, you have already searched it. Go ahead. I don't care what you do" (R. 101–102, 109). Since the F.B.I. agent did not regard this as clear consent, no search was made (R. 109). Petitioner called an attorney (R. 111), who appeared in the office of the United States Commissioner at 4:25 and was advised of the charges (R. 111).

The agent applied to the Commissioner for a search warrant to search the car (R. 112). There were two affidavits filed for the search warrant. One signed by the F.B.I. agent described the car to be searched and stated that he believed it contained "stolen merchandise, to-wit: Furs which are a part of the loot taken in a break-in at the Davidson Fur Company, Inc." The affidavit also described the sources of information as the official report of the Davidson robbery and the "tip" to the Cincinnati agent from a source believed to be reliable that petitioner had received the furs. The other affidavit signed by the city detective stated that he had arrested petitioner in the described automobile and that, with petitioner's consent, he had observed a quantity of furs in the trunk (R. 16–17).

A warrant was issued for the search of the car for property described as "stolen merchandise, to-wit:

[2] The F.B.I. agent did not talk to petitioner until the time that he arrested him. Meanwhile, he had contacted the Louisville office of the F.B.I. which in turn had discussed the situation with a government attorney (R. 124).

furs which are a part of the loot taken in a break-in at the Davidson Fur Company, Inc." (R. 17). In petitioner's presence the trunk of the car was opened and the four sacks of furs were removed and inventoried (R. 112–113, 125–126). When the agent asked petitioner where the furs came from petitioner replied, "I don't know where they came from. They are not mine. You must have put them in there. You have had the keys long enough" (R. 113). At the trial, petitioner claimed he had purchased the furs (R. 134–139).

Later that night, Mr. Davidson of the Davidson Fur Company inspected the furs and said they were not part of the furs stolen from his company. The agent then took steps to discover their source and ownership (R. 118). It developed that the furs had been stolen on August 29 or 30 from the Wermuth Fur Company of South Dakota (R. 53–59).

On a motion before trial to suppress the evidence seized under the warrant, the court held that the affidavits for the search warrant constituted probable cause and the warrant was validly issued (R. 35–36).

ARGUMENT

1. Petitioner attacks (Pet. 7–12) the sufficiency of the affidavits supporting the search warrant to state probable cause for the search, on the ground that they were based solely on hearsay. His argument ignores the affidavit of the city detective (R. 16–17), which was not hearsay, but reported that he had seen furs in the car petitioner was driving. Taken together, the affidavits showed official notice of the theft of

furs, information believed to be reliable that petitioner received the furs, corroborated by the fact that petitioner was in fact carrying furs. As the courts below held, this was sufficient probable cause for the issuance of a warrant for the search of the automobile. See *Jones* v. *United States*, 362 U.S. 257, 269; *Draper* v. *United States*, 358 U.S. 307.[3]

2. The fact that the furs, reasonably believed to be those stolen from the Davidson company turned out to have been stolen from another company, does not invalidate the search or seizure. While some, although not all, of the furs were labelled Wermuth Furs, the agent still could reasonably believe that the furs were those described in the warrant. Different labels on the furs some days after the robbery would not suggest to the agent that the furs were other than those described in the warrant; a change of labels would be a likely method of concealing the fact that furs had been stolen.

A search or seizure not based on probable cause does not become valid because contraband is in fact discovered. This Court said in *United State* v. *Di Re*, 332 U.S. 581, 595, that a search "is good or bad when it starts and does not change character from its success." A corollary to this is that a search based on probable cause does not become invalid because the

[3] Petitioner has italicized the statement that "no parol evidence" or response was submitted on the motion to suppress (Pet. 6). Testimony is not essential, however, when the attack is upon a search warrant based upon affidavits. In fact, petitioner's trial counsel asserted "* * * I doubt very much if it would be necessary to take any testimony about this" (R. 32). See *Jones* v. *United States*, *supra*, 362 U.S. at 267.

items seized were not the contraband they were reasonably thought to be. Thus, this Court has held that, if a search is valid and made in good faith, the officers need not ignore material related to other crimes than that which is the basis for the search. *Harris* v. *United States*, 331 U.S. 145, 154–155; *Abel* v. *United States*, 362 U.S. 217, 238. This principle particularly applies when the officers did not know that the items seized related to a different crime at the time of the seizure. Once it was learned, after the seizure had been made, that the furs were in fact stolen, although from a company different from that originally believed to be the source, there was of course no necessity to return them to petitioner.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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